PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

1285 AVENUE OF THE AMERICAS
NEW YORK, NEW YORK 10019-6064

TELEPHONE (212) 373-3000

LLOYD K GARRISON (1946-1991)
RANDOLPH E. PAUL (1946-1956)
SIMON H RIFKIND (1950-1995)
LOUIS S WEISS (1927-1950)
JOHN F WHARTON (1927-1977)

UNIT 3601, OFFICE TOWER A, BEIJING FORTUNE PLAZA
NO 7 DONGSANHUAN ZHONGLU
CHAOYANG DISTRICT
BEIJING 100020
PEOPLE'S REPUBLIC OF CHINA
TELEPHONE (86-10) 5828-6300

12TH FLOOR, HONG KONG CLUB BUILDING
3A CHATER ROAD, CENTRAL
HONG KONG
TELEPHONE (852) 2846-0300

ALDER CASTLE
10 NOBLE STREET
LONDON EC2V 7JU, U.K.
TELEPHONE (44 20) 7367 1600

FUKOKU SEIMEI BUILDING
2-2 UCHISAIWAICHO 2-CHOME
CHIYODA-KU, TOKYO 100-0011, JAPAN
TELEPHONE (81-3) 3597-8101

TORONTO-DOMINION CENTRE
77 KING STREET WEST, SUITE 3100
P.O. BOX 226
TORONTO, ONTARIO M5K 1J3
TELEPHONE (416) 504-0520

2001 K STREET, NW
WASHINGTON, DC 20006-1047
TELEPHONE (202) 223-7300

500 DELAWARE AVENUE, SUITE 200
POST OFFICE BOX 32
WILMINGTON, DE 19899-0032
TELEPHONE (302) 655-4410

WRITER S DIRECT DIAL NUMBER

212-373-3165

WRITER'S DIRECT FACSIMILE

212-492-0165

WRITER'S DIRECT E-MAIL ADDRESS

bbirenboim@paulweiss.com

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By Email (via Orran L. Brown, Sr., Esq.)

Special Master Wendell Pritchett, Esq.
Office of the Provost
University of Pennsylvania
3501 Sansom Street
Philadelphia, PA 19104

Special Master Use of the Appeals Advisory Panel on Claim Appeals

Dear Special Master Pritchett:

The NFL Parties respectfully submit this letter to respond to certain erroneous contentions in Co-Lead Class Counsel's July 6, 2018 letter responding to our June 28, 2018 letter concerning the above-referenced issue.

Critically, Co-Lead Class Counsel does not, and cannot, contest that recent appeal determinations (apparently made without AAP consultation on technical medical issues) reflected findings squarely at odds with prior AAP determinations on those same medical issues—demonstrating precisely why expert consultation is important. Instead, Co-Lead Class Counsel argues—in blatant bad faith and in conflict with their many prior statements on the matter and the Settlement Agreement to which they agreed—that the NFL Parties lack an appeal right of diagnoses made by Qualified MAF Physicians and

Qualified BAP Providers, and that the role of the Appeals Advisory Panel members ("AAPs") and the Appeals Advisory Panel Consultants ("AAPCs") is limited to reviewing pre-Effective Date claims. Neither argument is correct.

First, Co-Lead Class Counsel's position that the NFL Parties do not have the right to appeal a claim determination based on a diagnosis made by a Qualified MAF Provider or Qualified BAP Providers has no support in the Settlement Agreement. (*See* Seeger Letter at 3.) Section 9.5 of the Settlement Agreement, which sets forth the scope of appeals, describes two distinct areas of appeal: (i) "The Claims Administrator's determination as to whether a Settlement Class Member is entitled to a Monetary Award"; and (ii) "the calculation of the Monetary Award." Co-Lead Class Counsel's argument that the reference to "the Claims Administrator's determination" in that provision somehow strips the NFL Parties of their appeal regarding the diagnosis is wrong.

The Claims Administrator—not the underlying physician—is always the entity that issues the determination, regardless of when the diagnosis occurs or who makes the diagnosis.[1] Contrary to Co-Lead Class Counsel's suggestion, however, the Claims Administrator never makes a diagnosis; there is always an underlying physician who makes the diagnosis, whether it is a Qualified MAF Physician, Qualified BAP Providers, or a pre-Effective Date physician. The clear intent for the scope of appeal, as the words of Section 9.5 state, was the substantive issue of "whether a Settlement Class Member is entitled to a Monetary Award"—in other words, does he have the claimed diagnosis or not? There is no other issue to which these words reasonably could be construed to refer. This view is bolstered by the fact that subsection (ii)'s reference to the "calculation of the Monetary Award" refers to the Claims Administrator's more mechanical determination with regard to offsets and age at the time of diagnosis. As such, the only appeal even possibly contemplated by subsection (i)'s reference to "whether a Settlement Class Member is entitled to a Monetary Award" is if the diagnostic criteria set forth in the Settlement Agreement have been met. Otherwise, the two subsections would refer to the same thing—the mechanical check on the calculation of the award based on years played, history of Stroke or TBI, and age—and would be completely redundant of each other, a view that is flatly contrary to traditional rules of statutory construction which require that each provision be given a separate and independent meaning.

If there were any doubt on this issue, Co-Lead Class Counsel's submission to Court in seeking approval of the Settlement Agreement proves the distinction between these two areas of appeal. There, Co-Lead Class Counsel conceded that "the NFL Parties have a right to appeal either a determination of whether a Settlement Class Member is entitled to a Monetary Award or Derivative Claimant Award, or the amount of the Award."

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[1] In fact, the Claims Administrator does not conduct a substantive review of MAF and BAP diagnoses when issuing claim determinations in part because the Settlement Program was designed to permit the NFL Parties to review those diagnoses in consultation with medical experts and appeal those diagnoses that reflect errors.

(*See* Mem. of Law in Support of Class Pls.' Mot. for an Order Granting Final Approval of the Settlement and Certification of Class and Subclass 26, ECF No. 6423-1; *see also* Rule 7 of Rules Governing Appeals of Claim Determinations ("[T]he NFL Parties may appeal determinations by the Claims Administrator as to: (1) whether the Retired NFL Football Player (or Representative Claimant) is entitled to a Monetary Award; (2) how the Claims Administrator calculated the Monetary Award; and (3) whether the Claim Package is valid without medical records under Section 8.2(ii) of the Settlement Agreement.").)

Co-Lead Class Counsel's claim that diagnoses made by Qualified MAF Providers or Qualified BAP Providers are somehow immune to review on appeal because the physicians were approved by the Parties is a *non sequitur*, particularly where, as here, the NFL Parties have committed to uncapped liability based on diagnoses rendered by these physicians over the next 65 years. The fact that the Parties approved the Qualified MAF Physicians and Qualified BAP Providers based on limited diligence does not make them infallible. This is precisely why the Parties created the AAPs and AAPCs, who are highly-credentialed neurologists and neuropsychologists at the top of their fields, stringently vetted by the Parties for the very purpose of reviewing diagnoses made in the Settlement Program. And, indeed, as the NFL Parties' June 28, 2018 letter noted, the Claims Administrator has received feedback from the AAPs and AAPCs in connection with audits that certain MAF and BAP physicians have committed material errors[2] (despite, in certain instances, finding no evidence of potential fraud), and the Claims Administrator

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[2] For example, BrownGreer terminated Qualified MAF Physician Dr. Jason Muir on July 9, 2018. In notifying the Parties of that termination, BrownGreer noted that Dr. Muir diagnosed a retired player with Level 2 Neurocognitive Impairment despite employment not compatible with that diagnosis and Dr. Muir disregarding neuropsychological testing results in which the retired player "failed validity measures so badly that the neuropsychologist found that he did not meet the criteria for neurocognitive impairment." (July 9, 2018 email from Morgan Meador to the Parties.) In a related audit of the retired player's lawyer, an AAPC agreed with the findings of performance invalidity and an AAP found it unusual for Dr. Muir to disregard such test results. Had it not been for the related audit, this claim would have been approved as a Qualified MAF Physician diagnosis, and the NFL Parties would have been required to appeal on the basis that the diagnosis was rendered in error.

Co-Lead Class Counsel also seeks to mislead by arguing that the NFL's appeal rate of Level 1.5 and 2 claims involving diagnoses rendered by Qualified MAF Physicians evidences that the NFL "is at odds with the medical establishment." (Seeger Letter at 3.) Not so. Co-Lead Class Counsel knows full well—as do the Special Masters—that the vast majority of those appeals involve a single Qualified MAF Physician, Dr. Randolph Evans, who has since been terminated from his role by BrownGreer and provided a grossly disproportionate share of the total dementia diagnoses by Qualified MAF Physicians, and/or a neuropsychological practice group in Texas that administered the BAP testing regime to claimants but altered its diagnostic criteria to allow diagnoses that would be impermissible in the BAP. The Settlement Program's short history demonstrates that Qualified MAF Physicians are not unerring, and the NFL Parties' appeal right is a necessary check on the payment of otherwise invalid claims.

determined that the proper procedure for raising those errors was through the NFL Parties' appeal right.

Second, Co-Lead Class Counsel misleadingly minimizes the agreed-upon role of AAPs and AAPCs by citing their responsibilities to review pre-Effective Date claims and certain disagreements between Qualified BAP Providers as to an appropriate diagnosis, if any. (Seeger Letter at 2.) But the fact that the AAPs and AAPCs have these roles does not mean that they do not also have a key role in appeals of post-Effective Date claim determinations from Qualified MAF Physicians and Qualified BAP Providers. This is demonstrated by examining the "legislative history" of this provision. Co-Lead Class Counsel fails to mention the uncontestable fact that the Parties agreed to the creation of the aptly named *Appeals* Advisory Panel in the initial proposed settlement agreement—*at which time there was no mandatory pre-Effective Date AAP claim review*. Pre-Effective Date review was added to the revised settlement agreement as a fraud protection when the Parties uncapped the NFL Parties' liability. This new responsibility supplemented the role of the AAP to bolster overall protections; the Parties never agreed to eliminate other intended roles. Now, as it was then, the primary and originally intended purpose of the Panel was, as its name demonstrates, to assist on claim appeals over the 65-year term of the Settlement Agreement. As such, the intent was always for the AAPs and AAPCs to advise the Court on inherently technical medical issues that inevitably would arise on appeals and elsewhere. The language of Section 9.5 is fully consistent with this view.

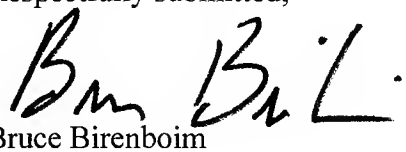
Co-Lead Class Counsel is also wrong that the NFL Parties' position is that it is "compulsory" and "mandatory" to involve the AAPs and AAPCs on every appeal. (Seeger Letter at 1-2.) That is not the NFL Parties' view. There may well be appeals where the record is clear in favor of appellant or appellee and the Special Master or Court need not seek consultation. But where the appeal involves technical medical issues—as recent appeals have done in a manner that goes to the heart of the diagnostic criteria of the Settlement Agreement—the plain language of the Settlement Agreement, and the Parties' plain intent was for the fact finder to use the neutral expert AAPs and AAPCs jointly recommended by the Parties and appointed "to advise the Court or the Special Master with respect to medical aspects of the Class Action Settlement." (Settlement Agreement, § 2.1(g); *see also* § 9.8.)

In sum, the NFL Parties' goal here is simple: to pay Monetary Awards to Settlement Class Members *who meet the diagnostic criteria for the Qualifying Diagnoses*. As the Court is well aware, that is the balance the Parties agreed to and the deal the Parties made, and that means that not every retired player with cognitive or neurological issues is entitled to a Monetary Award. To ensure this carefully calibrated and negotiated result, it is of critical importance that the Court and Special Masters use the AAP and AAPC resource on appeals involving technical medical issues outside of the Court's or Special Master's expertise, as the Claims Administrator has done in connection with audits.

For these reasons, the NFL Parties respectfully request a re-review of recent appeals that turned on medical issues for which an AAP member was not consulted, with

an accompanying stay of payment until that review is complete. We further respectfully again request that the Special Masters seek the advice of AAPs and AAPCs moving forward where an appeal raises technical medical issues.

Respectfully submitted,



Bruce Birenboim

cc: The Honorable Anita B. Brody
Special Master Jo-Ann Verrier, Esq.
Chris Seeger, Esq.
Brad S. Karp, Esq.